A **TAN SRI NORIAN MAI & ORS v. CHUA TIAN CHANG & ORS**

COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
ROHANA YUSUF JCA
UMI KALTHUM ABDUL MAJID JCA
B [CIVIL APPEAL NO: W-01-440-10-2012]
11 MAY 2015
[2015] CLJ (JT9)

C ***TORT:*** *False imprisonment – Damages, quantum – Arrest and detention – Arrest and detention under Internal Security Act 1960 – Arrest and detention of persons involved in political activities – Arrest and detention unlawful and without basis – Whether striking at very heart of democracy – Whether a serious assault on personal liberty – Appropriate quantum to be awarded*

D ***TORT:*** *Defamation – Defences – Qualified privilege – Arrest and detention – Arrest and detention of persons involved in political activities under Internal Security Act 1960 – Press statement by Inspector General of Police – Press statement falsely alluding to militant activities prejudicial to security of Malaysia – Whether statement reckless – Whether protection of qualified privilege thereby lost*

E ***TORT:*** *Defamation – Damages, quantum – Arrest and detention – Arrest and detention of persons involved in political activities under Internal Security Act 1960 – Press statement by Inspector General of Police – Press statement falsely alluding to militant activities prejudicial to security of Malaysia – Whether defamatory – Damages – Whether quantum awarded fair and warranting no appellate intervention*

F

The second to the sixth respondents ('the respondents') were arrested by the police and detained for more than 40 days each under ss. 73(1) and 8 of the Internal Security Act 1960 ('ISA'). The respondents averred that their arrest and detention was illegal, and in the event instituted an action against the first
G appellant, the Inspector General of Police, and the second and third appellants Minister of Home Affairs and Government of Malaysia, claiming damages for false imprisonment and defamation. The facts showed that, following the arrest, the first appellant had called for a press conference whereby he explained that the respondents were detained upon information
H gathered by the police's Bahagian Perisikan, that they were involved in militant activities prejudicial to the security of Malaysia ('press statement'). At the trial, however, no evidence was adduced by the police as to the respondents' militant activities which they deemed prejudicial to the security of Malaysia, and indeed, it was the testimony of police witnesses DW1, DW2, DW3 and DW4 that their interrogations of the respondents had
I nothing to do with militant activities or national security. On the evidence thus availing, the trial judge allowed the respondents' claim, both for false imprisonment and defamation (except for fifth respondent's claim for defamation which was dismissed), and consequently awarded the following

relief to the respondents: (i) RM15,000 in damages for false imprisonment for each day of their detention; (ii) RM30,000 in aggravated damages for false imprisonment; and (iii) RM100,000 in general, aggravated and exemplary damages for defamation.

The appellants had admitted liability for false imprisonment but had appealed against the quantum of RM15,000 per day awarded there for, and against the trial judge's finding of liability for defamation. It was argued, upon the authority *inter alia* of *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* ('*Badrul Zaman* case'), that the award for damages for false imprisonment should only be RM1000 per day, and further that, the finding of liability for defamation was flawed as, even if the press statement was defamatory, the defence of qualified privilege applied to the appellants. The second, third, fourth and sixth respondents in retort appealed against the sum of RM100,000 awarded for defamation, lamenting that it was too low and inadequate.

Held (affirming tort of false imprisonment but reducing quantum of damages thereof; dismissing appeal on defence of qualified privilege; affirming quantum of damages for defamation):
Per Abdul Wahab Patail JCA delivering the judgment of the court:

(1) While s. 73 of the ISA empowers a police officer to arrest and detain any person pending inquiries, there is a requirement that the police officer must have reason to believe that there are grounds which could justify detention of the detainee under s. 8 of the ISA, and further that, the detainee had acted or was about or likely to act in any manner prejudicial to the security of Malaysia. The requirement means that s. 73(1) does not authorise the arrest and detention of the respondents "pending further inquiries" in order to make out a case against them, but for purposes of verifying the grounds which could justify their detention under s. 8, and that they had acted or are about or likely to act in any manner prejudicial to the security of Malaysia, or to the maintenance of essential services therein or to the economic life thereof. (para 21)

(2) The press statement published to all and sundry that the police had reason to believe that there were grounds which would justify the respondents' detention under s. 8 and that they had acted or were about or likely to act in any manner prejudicial to the security of Malaysia. The press statement had associated the respondents with the activities of reform activists. Unquestionably, accusations of involvement in activities prejudicial to national security is *prima facie* defamatory if the association and accusation turns out to be not true. (para 22)

(3) The exercise of draconian powers to arrest and detain pending inquiries under s. 73 of the ISA calls for occasion to explain to the public the exercise of the power to reassure the public that the draconian powers were not being abused. Such an occasion is unquestionably an occasion of privilege and statements made thereat for general publication calls for protection of qualified privilege. But it is equally unquestionable that, if the occasion is abused, no defence of qualified privilege can arise or be sustained. (paras 28 & 29)

(4) Although the police's assessment of what amounts to a threat to national security must be given latitude and weight, it is open to examination. It ought also to be noted that where such actions were challenged, they must be answered and where they cannot be answered, consequences must follow. In the present case, merely maintaining that the provisions of s. 73 ISA had been followed and that there was prior investigation by Bahagian Risikan did not constitute a sufficient answer to a challenge to the police's assessment and decision. (paras 34 & 35)

(5) The defence of qualified privilege is a defence upon the basis that even though the statement was untrue or not provable as true, it was nevertheless made in good faith upon an occasion when there is a duty to make the statement to parties who have an interest to receive it. However, that good faith, and with it the defence of qualified privilege, is negated if the occasion is abused to make statements that are defamatory. (para 42)

(6) The explanation *vide* the press statement sought to attest that there was already some evidence before the respondents were arrested and detained under s. 73 for further inquiries. The evidence, however, was unchallenged that the respondents were not questioned nor required to explain as to their activities purported to be prejudicial to the security of Malaysia. With such admissions by DW1, DW2, DW3 and DW4, the press statement was clearly incorrect and not true. The press statement was thus made recklessly by the first appellant. (paras 35, 38 & 39)

(7) As was said in *Badrul Zaman*'s case, while damages to be awarded in false imprisonment cases is not predicated upon a simple arithmetic progression, and not determinable upon an hourly, daily, weekly or monthly basis, the quantum awarded must be "sufficient" as it will be in the public interest to award more than nominal damages "in order to give reality to the protection afforded by law to personal freedom". This said, the longer the false imprisonment the more severe is the tort. (para 62)

(8) The argument that since the first appellant had a duty to make the press statement to assure the public that the powers of arrest and detention pending inquiries under the ISA had not been abused, the first appellant, therefore, could not be liable for defamation even if there was malice, ran counter to the present day development in judicial review, where the exercise of supervisory jurisdiction and executive power must be made in good faith and without illegality, procedural impropriety and irrationality. In any case, the press statement as was made at the press conference herein to justify the respondents' arrest and detention was made without there being any evidence of the respondents' activities that were prejudicial to the security of Malaysia. The press conference, hence, was not an occasion of qualified privilege, and even if it was, the press statement, being without basis, and reckless, had lost the protection of qualified privilege. In the upshot, the appellants' appeal on qualified privilege was dismissed. (paras 45, 46, 47 & 48)

(9) The defamation action here is against public officers who had a public duty and responsibility to act to protect national security and to make the press statement, with the Government being held vicariously liable for their actions. A public officer such as the first appellant, so cast into the role of an opponent by the respondents, and so castigated and condemned for his actions in relation to his public duty, was indeed left in a predicament with nowhere to turn and no one to rightly trust. In the circumstances, in the absence of actual malice on the part of the first appellant, his recklessness ought to be seen as a mistake made in difficult times, resulting in him succumbing to using the powers which was not justified. Hence, in as much as this court appreciates the injury suffered by the respondents, it must be balanced against the interest of the State and the nation. This court was therefore of the view that there was no such error committed by the trial judge in the award as to damages for defamation (RM100,000) which warranted appellate intervention. It followed that the appeal by the second, third, fourth and sixth respondents on the quantum of damages for defamation stood dismissed. (paras 52 & 53)

(10) The instant case did not involve persons in criminal activities for personal gain, but persons in political activities whom the police stated it "had reason to believe" were involved in activities prejudicial to the security of Malaysia. The facts however showed that there was no basis for the arrest and detention, and the respondents were clearly arrested for their political activities. Such arrest and detention strikes at the very heart of a democracy, and was a very serious assault on personal liberty. A sufficient award, and in any case a more substantial award than that awarded in *Badrul Zaman* case, was called for. (para 65)

(10a) On the facts and in the circumstances, a sum ranging between RM400,000 to RM550,000 constituted appropriate awards for the tort of false imprisonment herein. This court would hence allow the appeal on damages for false imprisonment in part and reduce the award of general damages for the tort to RM10,000 per day. (paras 65 & 66)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden kedua hingga keenam ('responden-responden') telah ditangkap dan ditahan oleh polis selama lebih dari 40 hari di bawah ss. 73(1) dan 8 Akta Keselamatan Dalam Negeri 1960 ('ISA'). Responden-responden mengatakan bahawa penangkapan dan penahanan mereka adalah tidak sah dan dengan itu telah memfailkan satu tindakan terhadap perayu pertama, Ketua Polis Negara, serta perayu kedua dan ketiga Menteri Hal Ehwal Dalam Negeri dan Kerajaan Malaysia, menuntut ganti rugi kerana penahanan salah dan fitnah. Fakta menunjukkan bahawa, selepas penahanan tersebut, perayu pertama telah mengadakan satu sidang akhbar di mana beliau menjelaskan bahawa responden-responden ditahan berdasarkan maklumat yang diperolehi oleh Bahagian Perisikan polis, bahawa mereka terlibat dalam kegiatan militan yang menjejaskan keselamatan Malaysia ('kenyataan akhbar'). Bagaimanapun, di perbicaraan, tiada keterangan dikemukakan oleh pihak polis berkaitan kegiatan militan responden-responden yang didakwa menjejaskan keselamatan Malaysia, dan malahan, saksi-saksi polis DW1, DW2, DW3 dan DW4, dalam keterangan mereka, mengatakan bahawa soal-siasat yang dibuat terhadap responden-responden langsung tidak menyentuh soal kegiatan militan atau keselamatan negara. Berdasarkan keterangan yang dikemukakan, hakim bicara telah membenarkan tuntutan responden-responden (kecuali tuntutan fitnah responden kelima, yang ditolak) dan sekaligus memberikan relif-relif berikut kepada responden-responden: (i) ganti rugi RM15,000 sehari bagi setiap hari responden-responden ditahan; (ii) ganti rugi teruk kerana penahanan salah sebanyak RM30,000; dan (iii) ganti rugi am, teruk dan teladan sebanyak RM100,000 kerana fitnah.

Perayu-perayu mengakui liabiliti kerana penahanan salah tetapi merayu terhadap jumlah ganti rugi RM15,000 sehari yang dibenarkan, serta terhadap dapatan hakim bicara mengenai liabiliti berkaitan fitnah. Dihujahkan, antara lain berasaskan autoriti *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* ('kes *Badrul Zaman*'), bahawa award ganti rugi kerana penahanan salah sepatutnya hanyalah RM1,000 sehari, dan bahawa, dapatan liabiliti fitnah adalah cacat, oleh kerana, jikapun kenyataan akhbar berbaur fitnah, pembelaan perlindungan bersyarat terpakai kepada perayu-perayu. Responden-responden kedua, ketiga, keempat dan keenam membalas dengan merayu terhadap jumlah RM100,000 yang diawardkan untuk tort fitnah, dengan hujahan bahawa ia terlalu rendah dan tidak mencukupi.

Diputuskan (mengesahkan tort penahanan salah tetapi mengurangkan jumlah ganti rugi baginya; menolak rayuan pembelaan perlindungan bersyarat; mengesahkan jumlah ganti rugi kerana fitnah)

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Walaupun s. 73 ISA memberi kuasa kepada seorang pegawai polis untuk menangkap dan menahan seseorang bagi tujuan penyiasatan, terdapat syarat bahawa pegawai polis tersebut harus mempunyai sebab untuk mempercayai bahawa wujud alasan bagi menahan orang yang ditangkap di bawah s. 8 ISA, dan bahawa, orang yang ditangkap itu telah bertindak atau akan bertindak atau berkemungkinan akan bertindak secara yang menjejaskan keselamatan Malaysia. Syarat ini bermakna s. 73(1) tidak membenarkan penangkapan dan penahanan responden-responden "untuk siasatan lanjut" bagi melengkapkan kes terhadap mereka, tetapi hanya untuk maksud mengesahkan alasan-alasan yang mewajarkan penahanan mereka di bawah s. 8, dan bahawa mereka telah bertindak atau akan bertindak atau berkemungkinan akan bertindak secara yang menjejaskan keselamatan Malaysia, ataupun menjejaskan perkhidmatan-perkhidmatan asasi atau ekonominya.

(2) Kenyataan akhbar telah mengisytihar kepada semua bahawa pihak polis mempunyai sebab untuk mempercayai bahawa terdapat alasan-alasan yang mewajarkan penahanan responden-responden di bawah s. 8 dan bahawa, mereka telah bertindak atau akan bertindak atau berkemungkinan akan bertindak secara yang menjejaskan keselamatan Malaysia. Kenyataan akhbar telah mengaitkan responden-responden dengan aktiviti-aktiviti reformasi. Tidak boleh dipersoalkan bahawa pertuduhan melibatkan diri dalam aktiviti yang menjejaskan keselamatan negara, *prima facie*, adalah satu fitnah jika penglibatan dan pertuduhan didapati tidak benar.

(3) Pelaksanaan kuasa-kuasa menangkap dan menahan yang keras sementara menunggu siasatan di bawah s. 73 ISA mewajarkan waktu untuk menjelaskan pelaksanaan kuasa-kuasa tersebut kepada orang awam bagi memastikan kuasa-kuasa tersebut tidak disalah guna. Peristiwa sedemikian tentunya satu peristiwa yang dilindungi dan kenyataan yang dibuat di situ untuk pengetahuan umum adalah dilindungi oleh perlindungan bersyarat. Namun, ia juga betul bahawa, jika waktu atau peluang tersebut disalah guna, maka pembelaan perlindungan bersyarat tidak akan berbangkit dan tidak boleh diguna pakai.

(4) Walaupun penilaian polis tentang ancaman kepada keselamatan negara harus diberi pertimbangan, ia adalah terbuka untuk diperiksa. Harus juga diperhati bahawa bilamana perbuatan-perbuatan tersebut dicabar, ia harus diperjelaskan dan di mana ia tidak boleh diperjelaskan, maka

akibat-akibatnya harus menyusul. Dalam kes semasa, hanya dengan mengatakan peruntukan s. 73 telah diikuti dan bahawa wujud penyiasatan terdahulu oleh Bahagian Perisikan polis adalah tidak mencukupi bagi menjawab cabaran terhadap penilaian dan keputusan yang dibuat oleh pihak polis.

(5) Pembelaan perlindungan bersyarat adalah pembelaan yang bertunjang kepada asas bahawa walaupun kenyataan yang dibuat itu tidak benar atau tidak boleh dibuktikan benar, namun begitu ia dibuat dengan suci hati pada waktu di mana wujud tanggungjawab untuk membuat kenyataan tersebut kepada pihak-pihak yang mempunyai kepentingan untuk mendengarnya. Apapun, tindakan suci hati tersebut, dan bersama-samanya pembelaan perlindungan bersyarat, akan terhakis jika peluang itu disalah guna bagi membuat kenyataan yang bersifat fitnah.

(6) Penjelasan yang dibuat melalui kenyataan akhbar menyatakan bahawa sebelum responden-responden ditangkap dan ditahan, terdapat beberapa bukti untuk siasatan lanjut di bawah s. 73. Keterangan tersebut walau bagaimanapun tidak dicabar bahawa responden-responden tidak disoal dan tidak diminta memberi penjelasan mengenai aktiviti-aktiviti yang dikatakan menjejaskan keselamatan Malaysia. Dengan pengakuan yang dibuat oleh DW1, DW2, DW3 dan DW4 sedemikian, maka kenyataan akhbar adalah jelas tidak benar dan tidak betul. Oleh itu, kenyataan akhbar dibuat secara semberono oleh perayu pertama.

(7) Seperti yang dikatakan di dalam kes *Badrul Zaman*, walaupun ganti rugi yang diberikan dalam kes-kes penahanan salah tidak bergantung kepada perkiraan arithmatik yang mudah, dan tidak juga berasas kepada berapa jam, berapa hari, berapa minggu atau berapa tahun seseorang itu ditahan, jumlah yang diaward hendaklah "mencukupi" kerana ianya selaras dengan kepentingan awam untuk mengawardkan lebih dari ganti rugi nominal "bagi mencerminkan realiti perlindungan yang diberi oleh undang-undang terhadap kebebasan diri". Selain itu, lebih lama penahanan akan lebih serius pula tort yang berlaku.

(8) Hujah bahawa oleh kerana perayu pertama bertanggungjawab untuk membuat kenyataan akhbar bagi meyakinkan orang awam bahawa penggunaan kuasa-kuasa menangkap dan menahan untuk tujuan siasatan di bawah ISA tidak disalah guna, maka perayu pertama tidak boleh melakukan tort fitnah jikapun terdapat niat jahat, adalah bertentangan dengan perkembangan terkini undang-undang semakan kehakiman, di mana pelaksanaan bidang kuasa seliaan dan kuasa-kuasa eksekutif mesti dilaksanakan dengan suci hati dan tidak tercela oleh ketaksahan, ketakteraturan prosedur dan ketakrasionalan. Apapun, kenyataan akhbar seperti yang dibuat di sidang akhbar di sini bagi

mewajarkan penangkapan dan penahanan responden-responden dibuat tanpa adanya bukti kegiatan responden-responden yang menjejaskan keselamatan Malaysia. Sidang akhbar, dengan itu, bukanlah satu peristiwa perlindungan bersyarat, dan jikapun bersifat sedemikian, kenyataan akhbar tersebut, yang dibuat tanpa asas dan secara semberono, sudah tidak dilindungi oleh perlindungan bersyarat. Rayuan perayu-perayu berkaitan perlindungan bersyarat, dengan itu, adalah ditolak.

(9) Tindakan fitnah di sini adalah terhadap pegawai awam yang bertanggungjawab untuk bertindak bagi melindungi keselamatan negara dan untuk membuat kenyataan akhbar, dengan pihak kerajaan dijadikan bertanggungan secara vikarius atas tindakan mereka. Seorang pegawai awam seperti perayu pertama, yang dijadikan penentang oleh responden-responden, dan dikecam kerana tindakan-tindakan yang berkaitan dengan tugas awamnya, sebenarnya berada dalam keadaan serba salah tanpa ada tempat untuk mengadu atau orang untuk dipercayai. Oleh yang demikian, dalam ketiadaan niat jahat sebenar di pihak perayu pertama, kesemberonoan beliau harus dilihat sebagai kekhilafan yang dibuat dalam keadaan yang sukar, sekaligus menyebabkan beliau menggunakan kuasanya dengan cara yang tidak wajar. Oleh itu, walaupun mahkamah akur dengan kecederaan yang dialami oleh responden-responden, ianya harus dipertimbangkan bersama-sama dengan kepentingan awam dan negara. Mahkamah ini dengan itu berpendapat bahawa, tiada kekhilafan dilakukan oleh hakim bicara dalam mengawardkan jumlah ganti rugi (RM100,000) bagi fitnah yang mewajarkan campur tangan peringkat rayuan. Ianya mengikut bahawa rayuan oleh responden-responden kedua, ketiga, keempat dan keenam terhadap jumlah ganti rugi kerana fitnah adalah ditolak.

(10) Kes semasa tidak melibatkan orang yang bergiat dalam kegiatan jenayah, tetapi orang-orang yang bergiat dalam aktiviti politik, yang mana polis berkata mereka mempunyai "sebab untuk mempercayai" terlibat dalam kegiatan-kegiatan yang menjejaskan keselamatan Malaysia. Fakta bagaimanapun menunjukkan bahawa tidak ada asas untuk penangkapan dan penahanan mereka, dan responden-responden jelas ditangkap kerana kegiatan politik mereka. Penangkapan ini telah menikam denyut nadi demokrasi sendiri dan adalah satu serangan serius terhadap kebebasan diri. Suatu award yang mencukupi, dan apapun suatu award yang melebih dari award yang diberikan oleh kes *Badrul Zaman*, adalah wajar.

(10a) Berdasarkan fakta dan hal keadaan, satu jumlah antara RM400,000 hingga RM550,000 adalah jumlah award yang sesuai bagi tort penahanan salah di sini. Mahkamah ini dengan itu membenarkan rayuan terhadap ganti rugi sebahagiannya dan menurunkan award ganti rugi am bagi tort kepada RM10,000 sehari.

Case(s) referred to:

Bradford Corp v. Pickles (1895) AC 587 HL ***(refd)***

Council of Civil Service Unions & Ors v. Minister for the Civil Service [1984] 3 All ER 935 HL ***(refd)***

Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (M) [2012] 9 CLJ 297 CA ***(refd)***

Dawkins v. Lord Paulet (1869) LR 5 QB 94 ***(refd)***

Horrocks v. Lowe [1975] AC 135 HL ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(refd)***

Loutchansky v. Times Newspapers Ltd and Ors (Nos. 2-5) [2001] EWCA Civ 1805; [2002] QB 783 ***(refd)***

Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(refd)***

Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS MD Zakariah [2014] 7 CLJ 533 CA ***(refd)***

PP v. Ooi Kee Saik & Ors [1971] 1 LNS 113 HC ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Reynolds v. Times Newspapers Ltd & Ors [2001] 2 AC 127 HL ***(refd)***

The Secretary of State for the Home Department v. Rehman [2002] 1 All ER 122 HL ***(refd)***

The Zamora [1916] 2 AC 77, 107 PC ***(refd)***

Thompson v. Comr. of Police of the Metropolis [1998] QB 498 ***(refd)***

Legislation referred to:

Internal Security Act 1960, ss. 8, 73(1)

For the appellants - Kamal Azira Hassan (Normastura Ayub & Shaiful Nizam Shahrin with him); SFCs

For the respondents - Ranjit Singh (Razlan Hadri Zulkifli, Ho Kok Yew, Jennifer Wah Pei Lui & Che Beng Han Randy with him); M/s Owee & Ho

[Editor's note: For the High Court judgment, please see Mohamad Ezam Mohd Nor & Ors v. Tan Sri Norian Mai & Ors [2013] 3 CLJ 81 (overruled in part).]

Reported by Wan Sharif Ahmad

JUDGMENT

Abdul Wahab Patail JCA:

[1] The first to the eighth plaintiffs, Mohamad Ezam bin Mohd Nor, Chua Tian Chang, Hishamuddin bin Rais, Saari bin Sungib, Badaruddin bin Ismail, Badrulamin bin Bahron, Abdul Ghani bin Haroon and Gobalakrishnan a/l Nagappan commenced an action in the tort of false/unlawful arrest and detention, and the tort of defamation for a claim for general, aggravated and exemplary damages against the appellants. At the trial before the High Court, the first, seventh and eighth plaintiffs discontinued their action. The second, third, fourth, fifth and sixth plaintiffs remained. They are hereinafter referred to collectively as 'the plaintiffs'.

[2] The defences relied upon by the first, second and the third defendants Tan Sri Norian Mai, Menteri Hal Ehwal Dalam Negeri and Kerajaan Malaysia (collectively 'the defendants') were:

(a) at all material times the arrest and detention were in accordance with s. 73(1) and s. 8 of the Internal Security Act 1960 ("ISA"); and

(b) the press statements were not defamatory; and even if they were, the defendants relied upon the defence of justification and qualified privilege.

[3] At the end of the trial, the High Court entered judgment for the plaintiffs and awarded:

(a) to the second, third, fourth, fifth and sixth plaintiffs general damages for false imprisonment in the sum of RM15,000 each per day for each day detained;

(b) to the second, third, fourth, fifth and sixth plaintiffs aggravated damages for false imprisonment in the sum of RM30,000 each;

(c) to the second, third, fourth and sixth plaintiffs damages for defamation in the sum of RM100,000 (RM60,000 general and RM40,000 aggravated and exemplary damages); and

(d) costs RM200,000.

[4] The defendants appealed against the decision of the High Court made on 2 October 2012 allowing the claim by the second, third, fourth, fifth and sixth plaintiffs with costs.

[5] The plaintiffs appealed against the award of damages for defamation as inadequate.

[6] For convenience, we refer to the appellants and the respondents as 'the defendants' and 'the plaintiffs' respectively.

The Appeal

[7] At the commencement of the hearing of the appeal, this court was informed by the defendants that their appeal would proceed only on:

(a) liability for defamation; and

(b) quantum for general and aggravated damages for unlawful arrest and detention.

[8] In respect of liability for defamation, this court was informed that the defendants would not pursue the defence of justification but confine their submissions to the following, that:

(a) qualified privilege applied to the press statement; and

(b) there was no malice as the first defendant released a statement from the Cawangan Risikan & Sumber-Sumber Lain.

A **The Brief Facts**

[9] The second, third and fourth plaintiffs were arrested on 10 April 2001 under s. 73(1) of the ISA. The very next day, on 11 April 2001, a press conference was held, where a press statement ("the press statement") was issued to the press, asserting that their arrest and detention were related to
B militant activities. The arrests were reported in the newspapers on 12 April 2001.

[10] The news was carried on the NST, Berita Harian, Utusan Malaysia and Harian Metro on 12 April 2001, and reported that several other related
C arrests were forthcoming.

[11] The fifth and sixth plaintiffs were arrested and detained on 26 April 2001 and 20 April 2001 under the same section of the ISA. Their arrests were reported in the Malay Mail of 20 April 2001, Berita Harian of 21 April 2001 and the NST referred to the earlier arrests on 10 April 2001.

D **[12]** Pursuant to the powers under s. 8 of the ISA, the Minister issued a detention order against the second, third, fourth, fifth and sixth plaintiffs.

[13] The second, third and fourth; the fifth and the sixth plaintiffs were released on the 1 June 2001, 5 June 2001 and 12 June 2001 respectively.

E **The Press Statement**

[14] We examined the press statement issued by the first defendant. We had added our translation thereto:

> KENYATAAN AKHBAR MENGENAI PENANGKAPAN DI BAWAH
> F AKTA KESELAMATAN DALAM NEGERI 1960 ('AKDN')
>
> [Press Statement in relation to arrests under the Internal Security Act 1960 ("ISA")]
>
> Pada 10 dan 11 April 2001, pihak polis telah menangkap dan menahan 7 orang aktivis reformasi di bawah Sek 73(1) Akta Keselamatan Dalam
> G Negeri 1960 ('AKDN'). Mereka yang ditangkap dan ditahan adalah:
>
> 1.1 Mohamad Ezam bin Mohd Nor - 34 tahun;
>
> 1.2 Chua Tian Chang - 37 tahun;
>
> 1.3 Nisamuddin bin Md Rais atau Hishamuddin Rais - 50 tahun;
>
> H 1.4 Saari bin Singib - 43 tahun;
>
> 1.5 Gobalakrishnan a/l Nagapan - 41 tahun;
>
> 1.6 Raja Petra Raja Kamarudin - 49 tahun; dan
>
> 1.7 Abdul Ghani bin Haroon - 35 tahun
>
> I [On the 10th and 11th April 2001 the police had arrested and detained 7 persons named, (being the 1st, 2nd, 3rd, 4th, 7th and 8th plaintiffs herein) and one Raja Petra Raja Kamarudin under the ISA.]

2. Tangkapan dan penahanan ini dilakukan kerana terdapat maklumat-maklumat mengenai penglibatan mereka dalam kegiatan yang boleh memudaratkan keselamatan negara. Pihak polis perlu menjalankan siasatan yang rapi atas maklumat-maklumat tersebut. Kegiatan reformasi yang bermula pada bulan SEP 1998 merancang untuk menggulingkan kerajaan melalui demonstrasi jalanan secara besar-besaran dan bersiap-sedia untuk bertindak secara militan dengan mengambil beberapa pendekatan seperti berikut:

2.1 Telah melaksanakan langkah-langkah tertentu untuk mendapatkan bahan letupan termasuk bom dan 'grenade launcher';

2.2 Menggunakan 'molotov cocktail', 'ball bearing' serta berbagai-bagai senjata berbahaya untuk menyerang pihak keselamatan bagi menimbulkan keadaan huru-hara semasa demonstrasi jalanan di sekitar Kuala Lumpur pada bulan OKT 1998; dan

2.3 Mendapatkan bantuan dan sokongan guru-guru silat serta mempengaruhi sebilangan bekas pegawai dan anggota keselamatan supaya menyertai gerakan mereka.

[The arrest and detention was carried out because of information as to their involvement in activities that are prejudicial to national security. The police need to conduct detailed investigations on the information received. The reform movement that began in September 1998 planned to topple the government through large scale demonstrations in the streets and were ready to undertake militant action by:

Taking specific steps to obtain explosives including bombs and grenade launchers;

Use of molotov cocktails, ball bearings and various dangerous weapons to attack security personnel to cause disorder or unruly disturbances during street demonstrations around Kuala Lumpur in October 1998;

Obtaining assistance and support of silat teachers, as well as influencing ex-security officers and personnel to participate in their movement.]

3. Bagi membendung trend militan gerakan reformasi tersebut maka pihak polis telah mengambil tindakan ke atas 28 orang aktivis reformasi di bawah Sek 73(1) AKDN 1960 antara 20 SEP 98 hingga 24 DIS 98. Tindakan-tindakan pihak polis tersebut telah dapat meredakan keadaan buat sementara waktu.

[To contain the militant trend of the reform movement, the police had taken action against 28 reform activists between 20th September 1998 and 24th December 1998. The said actions had succeeded to abate the situation for a temporary period.]

4. Pada pertengahan tahun 1999, aktivis gerakan reformasi muncul kembali dengan berselindung di sebalik platform sebuah parti politik di mana sebilangan daripada mereka telah menjalankan kegiatan-kegiatan yang boleh mewujudkan ketegangan kaum melalui isu-isu keagamaan dan

perkauman. Ini termasuk penyebaran berita-berita palsu yang menggemparkan seperti dakwaan bahawa ramai orang Melayu telah dikristiankan semasa Pilihanraya Kecil Lunas. Ciri-ciri militan semasa Pilihanraya Kecil itu telah juga dilakukan oleh aktivis reformasi melalui perbuatan ganas dengan mengancam, mengugut dan menakut-nakutkan para pengundi serta orang ramai.

[In mid-1999 reform movement activists re-emerged, hiding behind the platform of a political party where a number of them had conducted activities that can cause racial tensions with religious and racial issues, including dissemination of false reports that many Malays had been converted to Christianity during the Lunas By-Election. Features of militant action was also carried out during the By-Election by reform activists through violent actions by threats and frightening voters and the public.]

5. Pada akhir tahun 2000, aktivis reformasi telah membuat ketetapan untuk menggunakan dua pendekatan berikut bagi mencapai matlamat mereka:

5.1 Akan terus melibatkan diri dalam proses demokrasi yang normal serta sistem pilihanraya; dan

5.2 Melalui cara-cara di luar perlembagaan dengan mencetuskan demonstrasi jalanan secara besar-besaran dan bercorak militan menjelang Pilihanraya Umum 2004.

[At the end of year 2000, reform activists had decided to adopt two approaches to achieve their objectives:

To continue to be involved in normal democratic process and in the election system;

Through extra-constitutional means by promoting large scale militant demonstrations in the streets during General Elections 2004;]

6. Ke arah merealisasikan perancangan tersebut, satu kumpulan sulit yang dianggotai oleh lebih kurang 20 orang aktivis reformasi telah diwujudkan di Kuala Lumpur. Sejak 6 JAN 2001 hingga 4 APR 2001, sebanyak 12 perjumpaan sulit telah diadakan oleh kumpulan ini bagi merancang untuk mempengaruhi rakyat membudayakan demonstrasi jalanan dan perhimpunan haram secara militan. Antara perancangan terpenting gerakan reformasi dalam masa yang terdekat ini adalah untuk menganjurkan demonstrasi jalanan yang dipanggil 'Black 14' secara besar-besaran di Kuala Lumpur pada 14 APR 2001. Bagi mengelirukan pihak keselamatan, perhimpunan tersebut dipanggil 'Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia' di mana mereka merancang untuk mengumpulkan seramai lebih kurang 50,000 orang yang akan berhimpun di sekitar Kuala Lumpur. Perhimpunan serta perarakan ini berpotensi menjadi rusuhan.

[Towards realising that plan, a secret group of about 20 reform activists was formed in Kuala Lumpur. Since 6 Januari 2001 until 4 April 2001, 12 secret meetings had been held by this group to plan to influence

citizens to adopt the culture of street demonstrations and militant racial gatherings. Among the most important preparations of the reform movement in the immediate period was to promote large scale street demonstrations in Kuala Lumpur called "Black 14" on 14 April 2001. To confuse the security agencies, the said assembly was called "Perhimpunan Penyerahan Memorandum Rakyat Mengenai Hak Asasi Manusia" where they plan to gather about 50,000 participants who will gather around Kuala Lumpur. Such gatherings and parades have the potential to become a riot.]

7. Adalah jelas aktivis reformasi sanggup melaksanakan kegiatan-kegiatan di luar perlembagaan dan undang-undang demi mencapai matlamat mereka. Oleh itu, tindakan di bawah Sek 73(1) AKDN 1960 diambil kerana pihak Polis mempercayai ada alasan-alasan untuk menahan mereka di bawah Sek 8 AKDN 1960 kerana telah bertindak dengan cara yang memudaratkan keselamatan negara.

[It is clear reform activists were willing to act unconstitutionally and unlawfully to achieve their ends. Therefore action was taken under section 73(1) of the ISA because the police believe there are reasons to arrest and detain the plaintiffs under section 8 for acting in a manner prejudicial to national security.]

Observations On The Press Statement

[15] With the exception of para. 1 which announced the arrests and detention, the first sentence of para. 2 and second sentence of para. 7, the bulk of the press statement described activities of reform activists that constituted acting in a manner prejudicial to 'national security', a term that in the context of Malaysia falls within the meaning of the term used in the ISA, 'security of Malaysia'.

[16] Paragraph 1 of the press statement, and similarly the arrests of the fifth and sixth plaintiffs clearly identified the plaintiffs. The first sentence of para. 2 explained they were arrested and detained because there was information of their involvement in activities prejudicial to national security and the police need to conduct thorough investigations.

[17] Section 73 of the ISA provides:

73 Power to detain suspected persons

(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe:

(a) that there are grounds which would justify his detention under section 8; and

(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

[18] If it is true there was such information, then only would the arrest and detention pending inquiries be authorised under s. 73(1).

[19] The press statement then went on to describe the activities of reform activists that began in September 1998 that constituted "acting in a manner prejudicial to the security of Malaysia", the actions taken successfully to contain them, the re-emergence of such activities in mid-1999, and the activities of the reform activists. Paragraph 7 began with concluding it was clear that reform activists were willing to act unconstitutionally and unlawfully to achieve their objectives. Then para. 7 of the press statement concluded with the following:

> ... Oleh itu, tindakan di bawah Sek 73(1) AKDN 1960 diambil kerana pihak Polis mempercayai ada alasan-alasan untuk menahan mereka di bawah Sek 8 AKDN 1960 kerana telah bertindak dengan cara yang memudaratkan keselamatan negara.

[20] The last sentence above faithfully reflected the language of s. 73(1).

[21] While s. 73 empowers a police officer to arrest and detain any person pending inquiries, there is a requirement that the police officer must have reason to believe there are grounds which would justify detention of that person under s. 8 and that the person had acted or was about to act or was likely to act in any manner prejudicial to the security of Malaysia. Read as a whole, the requirement that the police officer must have reason to believe means s. 73(1) does not authorise the arrest and detention of anyone "pending further inquiries" in order to make out a case against the person, but to verify the grounds upon which the police had reason to believe, the grounds which would justify the plaintiffs' detention under s. 8, and that the person arrested and detained had acted or are about to act or are likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

[22] The press statement of the arrest and detention at a press conference therefore meant publication to all and sundry that the police had reason to believe that there were grounds which would justify the plaintiffs' detention under s. 8 and that they had acted or was about to act or was likely to act in any manner "prejudicial to the security of Malaysia ...". Although the last sentence of the press statement faithfully reflected the language of s. 73(1), it was not mere formality but was a specific statement that the defendants had reason to believe. The press statement unquestionably associated the plaintiffs with the activities of reform activists. It is the wrong kind of person, citizen or politician who regards involvement or accusation of involvement in activities prejudicial to national security as a badge of honour. For the rest of us, it is unquestionably *prima facie* defamatory if the association and accusation turns out not to be true.

[23] Having come to this conclusion, it is necessary to examine whether the defence of qualified privilege arises.

Qualified Privilege

[24] In *Reynolds v. Times Newspapers Ltd & Ors* [2001] 2 AC 127 HL, Albert Reynolds, a former Irish Prime Minister was accused in the British press of deliberately misleading the Irish Parliament. Reynolds sued for defamation and the defendants pleaded, *inter alia*, qualified privilege. The House of Lords held that the defence of qualified privilege would be available in respect of political information when the defendant satisfied the old common law test, ie,: "where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. The public statement, including any press statement, in respect of the arrest and detention of the plaintiffs under the ISA pending further inquiries, is therefore necessarily protected by qualified privilege.

[25] An arrest and detention under the ISA, being without trial, is always a matter of public concern. A timely public statement by the authorities in explanation of such action, is very much in the public interest, to assure the public that the power to arrest and detain under it was not being abused. The public statement is in fact a detainee's best protection, being the publicization of his plight into the public notice.

[26] In *Loutchansky v. Times Newspapers Ltd and Others (Nos. 2-5)* [2001] EWCA Civ 1805; [2002] QB 783, it was explained by the English Court of Appeal that while the interest served was that of the public in a modern democracy in free expression and in a free and vigorous press, the corresponding duty upon the journalist was to discharge that function by behaving as a responsible journalist.

[27] The logic must equally follow from the elucidation in *Public Prosecutor v. Ooi Kee Saik & Ors* (*supra*) and *Loutchansky v. Times Newspapers Ltd and Others (Nos. 2-5)* (*supra*) that while police powers of arrest and detention pending inquiries is a necessity in cases affecting national security, there is a duty upon the police to act responsibly and not abuse the power. Likewise while qualified privilege is a defence, it is not an absolute defence and malice, as an abuse of that defence, negates it.

[28] Certainly, in our view, the exercise of the draconian powers to arrest and detain pending inquiries on the grounds the police have reason to believe there are grounds which would justify the plaintiffs' detention under s. 8 and that they had acted or are about to act or are likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, calls for occasion to explain to the public the exercise of the power to reassure the public that the draconian powers were not being abused, because it is only too easy and even perhaps tempting to label political opponents as a security threat and thus justifying their arrest and detention. There is thus a duty to explain so that the public is not only informed of such arrest but is also

A assured that the draconian powers were not abused. Such an occasion is unquestionably an occasion of privilege and statements made thereat for general publication calls for protection by qualified privilege.

[29] But it is equally unquestionable that if the occasion is abused, no defence of qualified privilege can be sustained even if an occasion for
B qualified privilege does arise to make a press statement.

[30] Cases such as *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147 FC, *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11 SC and *Dato' Seri Syed Hamid Syed Jaafar Albar (Menteri Dalam Negeri) v. SIS Forum (Malaysia)* [2012] 9 CLJ 297 CA have established
C that matters involving security and public order are not amenable to judicial review, and that disclosure of the information upon which the action was taken is undesirable.

[31] We bear in mind also the impeccable elucidation in *Public Prosecutor*
D *v. Ooi Kee Saik & Ors* [1971] 1 LNS 113; [1971] 2 MLJ 108 by Raja Azlan Shah J (as His Majesty then was) on the balance between the Government's duty to preserve public peace and order, and therefore the right to legislate laws to do so, and the public right of lawful criticism of the Government:

> The Government has a right to preserve public peace and order, and
E therefore, has a good right to prohibit the propagation of opinions which have a seditious tendency ... Therefore, a meaningful understanding of the right to freedom of speech under the Constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions ... The dividing
F line between lawful criticism of Government and sedition is this - if upon reading the impugned speech as a whole the court finds that it was intended to be a criticism of Government policy or administration with a view to obtain its change or reform, the speech is safe. But if the court comes to the conclusion that the speech used naturally, clearly and indubitably, has the tendency of stirring up hatred, contempt or
G disaffection against the Government then it is caught within the ban of paragraph (a) of section 3(1) of the Act ... To 'excite disaffection' in relation to a Government refers to the implanting or arousing or stimulating in the minds of people a feeling of antagonism, enmity and disloyalty tending to make government insecure.

H **[32]** As to who should be the judge of what national security requires, Lord Parker delivering the opinion of the Judicial Committee in *The Zamora* [1916] 2 AC 77, 107 PC, had this to say:

> Those who are responsible for national security must be the sole judges of what the national security requires. It would be obviously undesirable
I that such matters should be the subject of evidence in a court of law or otherwise discussed in public.

[33] In *The Secretary of State for the Home Department v. Rehman* [2002] 1 All ER 122 HL, Lord Slynn in the House of Lords expressed the view that the threat need not be a direct threat to national security so that the executive is not hampered from assessing how to protect the interests of the State, which include "not merely military defence but democracy", and "the legal and constitutional systems of the state". Lord Slynn found it self-evident that "national courts must give great weight to the views of the executive on matters of national security", and it "should not ordinarily interfere with a case in which it considers that the view of the *Home Secretary is* one which could reasonably be entertained".

[34] Even though the police's assessment of what amounts to a threat to national security must be given latitude and weight, it does not mean it is not open to examination subsequently, otherwise the public has no protection from the police purporting to act in the name of national security when they are not. The powers cannot be abused or exercised arbitrarily with impunity. In *Council of Civil Service Unions & Ors v. Minister for the Civil Service* [1984] 3 All ER 935 HL, which discussed *The Zamora* (*supra*), Lord Fraser of Tullybelton explained:

> The decision on whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information, and in any event the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged, on the ground that it has been reached by a process which is unfair, then the Government is under an obligation to produce evidence that the decision was in fact based on grounds of national security.

[35] Hence, it is not that actions to protect national security cannot be challenged at all, but where it is successfully challenged, it must be answered. If it cannot answer, legal consequences may follow. It is the obvious counterpoise in the system of check and balance that while powers of arrest and detention in the interests of national security are necessary, and are unacceptable to or feared by only those who expect to engage in such activities, it is equally obvious it is a power that must be exercised responsibly and not abused. It follows therefore that merely maintaining that the provisions of s. 73 had been followed and there was prior investigation by Bahagian Risikan is not a sufficient answer to a challenge to the assessment and decision.

[36] We recognise it may be difficult to successfully challenge the assessment and decision, given the nature of the evidence and the confidential nature of investigations on threats to national security. Activities prejudicial to national security more often than not are conducted secretly. The nature of investigations may necessarily be confidential, where disclosure may endanger the sources and compromise the ability to investigate. A maximum 15 day remand under the Criminal Procedure Code means that arrest is

authorised only when the better part of an investigation had been completed and evidence obtained before arrested is authorised. The two months maximum detention under s. 73 of the ISA reflects recognition of the difficulty to gather evidence ultimately to satisfy the Minister under s. 8 to make a detention order.

[37] Ironically, direct evidence to prove involvement in activities prejudicial to national security is as notoriously hard to come by, as it is to successfully challenge the Government's assessment and decision as to threat to national security. But that is not to say it can never be proved, because total secrecy is not possible. If a person is arrested and detained, relatives, friends and associates will know he is missing. The person arrested and detained himself not only knows of his arrest and detention, but also how he is dealt with or treated while he is under arrest and detention. These may show whether the police officer acting under s. 73 had reason to believe that there are grounds which would justify detention of that person under s. 8 and that the person had acted or was about to act or was likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. That person may be able to identify the persons having charge of him when arrested and detained, require their attendance as witnesses, and if necessary to call them and examine them as hostile witnesses.

[38] In this case, the evidence was unchallenged that the plaintiffs were not questioned or required to explain as to their activities purported to be prejudicial to the security of Malaysia. There was no explanation in evidence as to why they did not do so. Furthermore the defendants' witnesses DW1, DW2, DW3 and DW4 did not say, giving reasons, that they were not able to disclose the evidence they found, but on the contrary admitted they did not find anything to link the plaintiffs to the militant activities, and that the interrogations had nothing to do with national security.

[39] The press statement had asserted that the arrest and detention was made upon information obtained. That the information was obtained by the Bahagian Risikan and supplied to the first defendant is no defence that the first defendant can rely on to show lack of malice. The explanation provided by the press statement meant there was already some evidence before the plaintiffs were arrested and detained under s. 73 for further inquiries. The admissions of DW1, DW2, DW3 and DW4 meant that the press statement, and

(a) prepared before the press conference called for the purpose; and

(b) released to the press in the press conference by the first defendant, the highest ranking officer in the police force,

was incorrect and not true when it gave the inference there was some evidence against the plaintiffs of their activities prejudicial to the security of Malaysia when they were arrested and detained pending further inquiries.

The press statement, issued to assure the public that s. 73 of the ISA was not being abused, were in the circumstances made recklessly by the first defendant.

[40] We note that:

(a) the act of arrest and detention pending inquiries in respect of actions prejudicial to the security of Malaysia is authorised by the ISA; and

(b) the defendants relied upon the report of the Bahagian Risikan of the police force.

[41] It is trite that truth (justification) is a complete defence, but where a statement alleged to be defamatory is unable to be defended by a defendant as being true, then the defence of qualified privilege may be relied upon to provide a defence, if it is made upon an occasion as described in *Reynolds v. Times Newspapers Limited & Ors* (*supra*), being communication on an occasion where it appears there is a duty to make a statement, and the persons to whom it was made had a corresponding interest to receive it.

[42] The defence of qualified privilege is relied upon primarily when one is unable to prove the truth of the statement, or when the statement made is untrue. The defence of qualified privilege is therefore a defence upon the basis that even though the statement made was unable to be proved as true, or is in fact untrue, it was made in good faith upon an occasion when there is a duty to make the statement to parties who have an interest to receive it. That good faith is negated, and the defence of qualified privilege with it, when the occasion is abused to make the statements that are defamatory. The law of defamation must strike a balance between the duty to make the press statement and protecting persons against untrue statements that harm them.

[43] Amongst the old cases the reading of which provide diversion to judges, are *Dawkins v. Lord Paulet* (1869) LR 5 QB 94 and *Bradford Corp v. Pickles* (1895) AC 587 HL. In *Dawkins v. Lord Paulet* (*supra*), a captain sued the major general commanding the brigade alleging libel in a report on the captain. It was held by a majority that even though there was malice and absence of any reasonable or probable cause, the major-general was not liable. Cockburn CJ, dissenting, held the view that the major-general would lose his defence if the captain proves he lacked *bona fides*. Mellor J considered that where a person is doing his duty, the question of malice was irrelevant:

> I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty and not the motives under which it is done. In short, it appears to me, that the proposition resulting from the admitted statements on this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not.

[44] In *Bradford Corp v. Pickles* (*supra*), the respondent diverted water so that it no longer flowed to his neighbour's property. The purpose appeared to be to force the neighbour to buy his property at a higher price. It was held that no one has a right to divert water flowing to their property, and therefore the diversion by P did not constitute a nuisance.

[45] On the face of it, these cases appear to lend support to the argument that the defendants having the responsibility to maintain security of Malaysia, and in using the ISA, had a duty to make the press statement to assure the public that the powers of arrest and detention pending inquiries was not being abused, cannot be held liable for defamation in a press statement issued in explanation, even if there was malice.

[46] However, the argument would not be in accord with the present day developments in judicial review where in the exercise of its supervisory jurisdiction, judicial scrutiny is directed to examination of whether the executive power was exercised without illegality, procedural impropriety or irrationality (see *Council of Civil Service Unions & Ors v. Minister for the Civil Service* (*supra*)), meaning that the executive power must be exercised in good faith and not abused. The notion that there could be no liability for the wrong or spiteful exercise of a right is inconsistent with these principles of judicial review. In *Horrocks v. Lowe* [1975] AC 135 HL, Lord Diplock had this to say:

> ... The public interest that the law should provide an effective means whereby a man can vindicate his reputation against calumny has nevertheless to be accommodated to the competing public interest in permitting men to communicate frankly and freely with one another about matters in respect of which the law recognises that they have a duty to perform or an interest to protect in doing so. What is published in good faith on matters of these kinds is published on a privileged occasion. It is not actionable even though it be defamatory and turns out to be untrue. With some exceptions which are irrelevant to the instant appeal, the privilege is not absolute but qualified. It is lost if the occasion which gives rise to it is misused. For in all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit - the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the occasion for some other reason he loses the protection of the privilege.

[47] When the press statement was considered together with the admissions of DW1, DW2, DW3 and DW4 and the unexplained absence of evidence and questioning or confronting the plaintiffs as to their activities alleged to be prejudicial to the security of Malaysia, one was led to the conclusion that the press statement was made to justify the arrest and detention without there being evidence of the plaintiffs' activities that were prejudicial to the security of Malaysia which would have justified action under s. 73 of the ISA for further enquiries. Strictly the press conference was not an occasion of

qualified privilege, or even if the occasion were accepted as one of qualified privilege, the press statement, being, from the admissions of DW1, DW2, DW3 and DW4 to be without basis, was none other than reckless and without foundation, and the protection of qualified privilege was thereby lost.

[48] We would, therefore, dismiss the defendants' appeal on qualified privilege.

Quantum Of Damages, Defamation And False Imprisonment

[49] The fifth plaintiff did not appeal against the finding of the High Court to exclude the fifth plaintiff and entering judgment in favour of the second, third, fourth and sixth plaintiffs only. The second, third, fourth and sixth plaintiffs appealed against the quantum of RM100,000 (RM60,000 general damages and RM40,000 aggravated and exemplary damages) awarded by the High Court.

[50] The defendants appealed against the award of damages in respect of false imprisonment at RM15,000 per day.

[51] We accept the submission that in defamation cases, general damages are essentially the compensation order by the court for damage done to the plaintiff's reputation.

[52] In giving the circumstances and the submissions our anxious consideration, we appreciated an important distinction. This case is not a defamation action against another private person or company. It is against public officers with a public duty and responsibility to act to protect national security and to make the press statement, and the Government being held vicariously liable for their actions. With duty and responsibility of government on one side and the persons arrested and detained and press statement made in respect of them and their arrest and detention on the other, what is a public officer to do when he is cast by such persons into the role of an opponent, challenged, castigated, accused and condemned, and their very act condemned if not for one reason, then another. It is a predicament that leaves the officer with nowhere to turn and no one to rightly trust. In the absence of evidence of actual malice on the part of the first defendant, we conclude the recklessness in this case was a mistake made in difficult circumstances, resulting from public officers succumbing to using the powers when it is not justified.

[53] As much as we appreciate the injury suffered by the plaintiffs, it must be balanced against the interests of the State and the nation, and that includes all of its citizens, for whose interests the plaintiffs no doubt would be happy to represent. If the plaintiffs' purpose is to act, to take risks and make sacrifices if necessary for the people, it would be odd that the citizens indirectly to have to now pay the plaintiffs' substantial damages for the

defamation. We think that more often than not in such circumstances, the sacrifices, where warranted, and the vindication of a judgment are more valuable than any purely monetary award.

[54] We were, therefore, not persuaded that there has been such an error to warrant appellate intervention in the exercise of discretion by the trial judge in the award as to damages for defamation. Accordingly, we dismissed the appeal by the second, third, fourth and sixth plaintiffs on the quantum of damages for defamation.

[55] Since the defendants' appeal is confined to quantum of damages for false imprisonment, it is unnecessary:

(a) to address the questions of *res judicata* in this case based upon the decision of the Federal Court in *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 FC. Mohamad Ezam Mohd Noor not being a party in this case, *res judicata* does not arise as the parties are not the same; or

(b) to address the question of whether there was unlawful arrest and detention or not.

[56] The High Court dealt with the issue of damages for unlawful arrest and false imprisonment between paras. 36 and 39 of the grounds of judgment. The High Court had awarded RM15,000 per day.

[57] The Senior Federal Counsel referred to the decision of this court in

(a) *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* [2014] 7 CLJ 533 CA; and

(b) *Thompson v. Comr. of Police of the Metropolis* [1998] QB 498.

[58] In *McGregor on Damages*, it was observed by the learned commentator that:

> The details on how damages are worked out in false imprisonment are few: generally it is not pecuniary loss but a loss of dignity and the like and is left much to the jury's and judge's discretion. The principal heads of claim would appear to be the injury to liberty, i.e., the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, i.e., the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status and injury to reputation ... In addition there may be recovery for any resultant physical injury, illness or discomfort ... further any pecuniary loss which is not too remote is recoverable; there appears to be no modern reported cases ... that any loss of general business or employment is recoverable would seem to follow from *Childs v. Lewis* ...

[59] The point made in *McGregor* is that the principle of damages for false imprisonment is not pecuniary loss but for the loss of dignity by the false arrest and imprisonment, but pecuniary loss can be recovered provided it is pleaded and not too remote.

[60] The claim in this case is predicated upon false imprisonment only, and as in *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* (*supra*), we hold that the pleadings nor the evidence adduced do not provide support for a claim for pecuniary loss.

[61] Case-law in respect of damages for false imprisonment, was reviewed in *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* (*supra*). The award of RM3,000,000 pegged at the rate of RM20,000 per day and discounted at 50% was reduced to an award of RM300,000, effectively amounting to RM1,000 per day.

[62] This court in *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* (*supra*) has stated that the total amount for longer periods is not a case of simple arithmetical progression, but that damages awarded must be 'sufficient' since it will be in the public interest to award more than nominal damages "in order to give reality to the protection afforded by law to personal freedom". This is because the fact remains that the false imprisonment remains one and the same. False imprisonment is not a separate wrong each determined upon a daily, weekly or monthly basis. Nor is it upon an hourly or minute by minute basis. Nevertheless it is unarguable that although the severity of false imprisonment is not necessarily upon an arithmetical progression, the longer the false imprisonment the more severe is the tort. In our view, the circumstances is always relevant including the reasons given for the arrest and detention, whether efforts made to seek release was actively resisted. If a person did not seek release, but was happy to remain in detention *albeit* unlawfully, he cannot be said to have suffered much loss of dignity and he should not use the occasion for lucrative income by claiming damages. Ultimately the damages is for what is pleaded, the evidence adduced in respect thereof, and only for damages that is reasonably foreseeable and reasonable.

[63] In *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* (*supra*), personal freedom was curtailed for acting:

> ... dengan sedar dan rela hati telah melibatkan diri dalam kegiatan-kegiatan memalsukan dokumen-dokumen perjalanan Malaysia serta menguruskan penghantaran rakyat warganegara asing berhijrah ke negara ketiga daripada Malaysia dengan menggunakan dokumen-dokumen yang telah dipalsukan oleh kamu di mana dengan kegiatan kamu ini boleh memudaratkan keselamatan Malaysia.

[64] That case involved 32 fake visas and successfully organising the departure of about 175 persons who had overstayed in Malaysia.

[65] From the press statement, the instant case involved not persons in criminal activities for personal gain, but persons in political activities whom the police stated it "had reason to believe" was involved in activities prejudicial to the security of Malaysia but at the trial, neither evidence for

such reason to believe was produced nor reasons for the failure to do so was presented in the trial, leading to the conclusion there was no basis for the arrest and detention, and that the plaintiffs were arrested for their political activities. Such arrest and detention strikes at the very heart of a democracy, and in our view, is a much more serious assault on personal liberty and with very much less justification for arrest and detention. The constitution expects of the police a fair, objective and independent approach in respect of political activities, as it is the key to a functioning democratic system. The police must be seen to be fair, objective and independent. Only when respected as being fair, objective and independent can it be effective in serving its function within the law. For this reason a sufficient award in this case must be substantially more than in a case 'such as *Penguasa Tempat Tahanan Perlindungan Kamunting, Taiping & Ors v. Badrul Zaman PS Md Zakariah* (*supra*). A sum ranging between RM400,000 and RM550,000 would be appropriate.

[66] We would, therefore, allow the appeal on damages for false imprisonment in part to reduce the award of general damages to RM10,000 per day.

[67] We conclude with the observation that the fundamental constitutional principle is that the rights and liberties of persons and powers of the institutions of the State are balanced against each other in the interests of the security of Malaysia or any part thereof, the maintenance of essential services therein and the economic life thereof. No right, liberty or power is absolute. Acceptance and adherence to the principle is essential to the functioning of the constitution.

[68] Accordingly we:

(a) dismissed the appeal by the defendants on the defence of qualified privilege for defamation;

(b) dismissed the appeal by the plaintiffs on quantum of damages for defamation;

(c) allow the appeal on quantum of damages for false imprisonment by reducing the sum from RM15,000 to RM10,000 per day; and

(d) ordered each party to bear their own costs.